CHAPTER II.

OF SEPARATE RIGHTS OR SERVITUDES.

SECTION I.—THE NATURE OF RIGHTS.

§ 1.

We must now turn to a subject connected with ownership, which will be found, in the course of our study, to have a very great importance.

We have spoken of a man's "property" of "ownership" as if it was a simple and not a composite thing; but a reference to a few familiar examples will at once recall us to a sense of the incompleteness of such an idea.

I own a field, but at the same time the inhabitants of a neighbouring village have a right of driving cattle through it; this right prevents my ever cultivating (or otherwise utilising) the strip of land over which the cattle are driven. Government may be the owner of a forest, but, notwithstanding that fact, there may exist rights of grazing in favour of the neighbouring village. Here the Government officer in charge can never close the whole forest at once and plant it over; nor can he lease out the whole of the grazing, nor cut the grass.

In both of these cases the owner has something less than the absolute or perfectly full enjoyment of his property. In other words, while the property itself remains to the owner, and while his ownership is *not in itself* reduced or altered, still, some of the rights which go to make up a perfect or unrestricted ownership, have been as it were detached and vested in other persons. The detached rights are of the nature of "ownership" *in this sense only* "that they are rights over a specific thing available against the world at large[1]."

[1] Markby, § 393, page 198. I cannot express this with the accuracy that I should like. The subject will, however, become clear by the aid of what follows. It is of immense importance to understand it thoroughly. Misapprehension on the subject is at the bottom of many of the difficulties with which the attempt to introduce rational forest law into India has been beset.

§ 2.

Ownership (which the Roman lawyers described by the convenient term *dominium*, as meaning *full* or perfect ownership) may be regarded as an aggregate or bundle of all possible rights which, together, make up an absolutely unrestrained enjoyment.

The Roman lawyers neatly expressed this by saying that the *dominus* or full owner had the use (*usus*), the whole of the products, (*fructus*), the right entirely to consume (*abusus*), and the right of transferring or alienating at pleasure (*vindicatio*).

If a certain right to use some of the produce or to do something, or have something done, were, so to speak, broken off and separated from, the total of rights which made up full ownership, such a separate right was called by the Roman lawyers a *"servitude,"* because the person who held the separated right over some one else's land or house, or forest (or whatever it was) made, as it were, the property *to serve* his purpose.

§ 3.

The student will not, I trust, feel staggered at this allusion to Roman law. But, in fact, the Roman law dealt so neatly, logically, and conveniently, with the subject, that both the method and language have been either adopted into, or at least have largely coloured, modern systems of law; and the language of the text-books in which those systems are explained, would hardly be intelligible to a student who did not know what the Roman terms meant.

§ 4.

In England there is no general term for these "servitudes," nor do we find a complete classification of such rights. The English law, indeed, gives a special name, *"easements,"* to *one* class of these rights, leaving the others to be merely called 'profits à prendre' or 'rights of common.' This classification is one of mere convenience, and at the same time the line of distinction is by no means clear. For example, a right to take water from a neigh-

bour's spring is an easement in English law, but a right to take coal from his pit is not; it is a right of common[2].

§ 5.

In classifying servitudes, the Roman lawyers adopted a distinction based on the circumstance that the right affected the *soil* itself, or something built on the soil. One they fancifully called "rural," the other "urban" servitudes: originally, I suppose, because buildings were commoner in the city and the open soil in the country. Obviously, however, a right of way or right to use a spring, affecting the soil itself, might be in the city, and a right connected with a building might be in the country.

§ 6.

A more important distinction, however, is one which has been adopted into several modern systems of law. Servitudes were divided into "real" and "personal."

[2] This circumstance has probably led the framers of Indian Statutes to extend the meaning of the word easement. In the latest Limitation Act (XV of 1877) easement is now defined to *include* rights to produce, &c. And the "Easements Act V of 1882" has made use of the same extension of sense: but the Act only relates to rights which are real servitudes—held in respect of immovable property and is not yet generally applied to. As regards the English law distinction, (Mr. Markby, §§ 373—375) attributes it to practical convenience. Easements are all concerned "with the enjoyment of their respective properties, by contiguous owners on points of great importance on which they are likely to come into conflict; they are rights which relate to getting rid of what is noxious, to procure a plentiful supply of that which is useful, to free ingress and egress, and to the commodious exercise of trade." Contiguous houses require the regulation of the support, which one, or the soil on which it stands, gives to the other. They require that questions of drainage, rain drippings and water passing on to, or through, the other house, should be settled; they require also that there should be access to, and means of getting out of the house; that air and light should come in; that water should be available; and so forth. Contiguous lands are in the same position; a right of way from one to another; right for passage for drainage or canal water; right to support of the soil by the adjacent soil,—all these matters are evidently of one kind, and are governed by the same set of rules; therefore they came to be called "easements," without it being precisely defined what were the limits of the term. It is easy to conceive, but not very easy to put into language, a distinction between this group of rights, and rights to dig sand or gravel, to cut turf or grass, to graze cattle, and to cut firewood or timber. One feature at least they have in common, they may equally be acquired by prescription.

Real servitudes are those which only exist *in connection with some property*. A right of way from your field across B's close is a real servitude, because it is connected with *your field;* it is not you as an individual that have a right of way across B's land, but you *as owner*, for the time being, *of the field*. In other words, the right of way over B's land is attached to the field, no matter who owns it for the time being.

And when our Indian Acts speak of the right being "*appendant*" to some property, they mean that it is attached in this way. In such cases, the property which has the right is called the *dominant* estate, and the other over which the right exists, is the *servient* estate. Thus, a Burmese monastery, which has a right to bamboos from the neighbouring forest, is the *dominant* and the jungle the *servient* estate, and the right is "appendant" to the monastery[3]. Other rights which reside in a man, as a person (whether or not he is owner for the time being of a particular house or land) are "personal" servitudes, or, to use the English term, "in gross." I may have a right to graze twenty cows in your forest, not because I am owner of house A, but in my own person: then that is a personal servitude.

§ 7.

There are no doubt many rights which, in their very nature, must always be "real." For instance, if I have a right, as against you, not to have my light and air blocked out by your building, it is obvious that it is in virtue of *some house* or *property* of some sort, of mine, which is not to be darkened or confined, that the right exists; and if the house permanently ceased to exist, the right would cease also.

[3] I do not know why our Legislature chose the word "appendant," because, in the English law, the term a "right appendant" has a very peculiar and special meaning. In fact, it means that the right in question is, by the common law, invariably understood to be attached to a *particular kind of land tenure*, which the student need not trouble himself about. The ordinary term in English law for a right which is a *real* servitude (that is, in favour of one property over another) is "appurtenant" not "appendant." In the Burma Forest Act (XIX of 1881) the use of the term appendant has been avoided (and so Act V of 1882); the right is spoken of as being "for the beneficial enjoyment of" the dominant estate.

If I have a right to let my drainage water flow on to your land, the right must be because of a house or some land from which the drainage comes. Rights of way also furnish a good example: unless you have some house or land *to go* to (which is the dominant estate), it is impossible for you to have a right of way over my field[4].

But many other rights, such as a right of common, of grazing, of fishing, cutting turf, feeding pigs on acorns, or of cutting wood, may be either personal or real.

In India I do not think it possible to draw any line between "real" and "personal" servitudes on any other grounds than the nature of things.

In the case of forest rights, no doubt the rights are very generally not personal, *e.g.*, it is the householders of village X that have the right of grazing in forest A. If one of these inhabitants were to go away and reside permanently somewhere else, he would lose the right. But it is easy to conceive cases where the right might be personal. I mention this, because in the continental text-books, it is stated or taken for granted that forest-rights are always real servitudes. This could not be applied strictly to India.

The Act V of 1882 (at present only in force in Madras and the Central Provinces) will not, even if generally extended, affect any servitudes except *real* servitudes.

§ 8.

I will now conclude the subject of servitudes with a few necessary remarks on the way in which such rights are acquired.

I have already remarked that by a fair extension of the term, there may be such a thing *as a possession of a right*, although a right is an 'incorporeal,' not a tangible thing.

This possession is governed by exactly the same principles as before; it is not any mere physical act as such that constitutes the

[4] Nor need I account for a possible right residing in a person, to go, not to some property of his across another's field, but to a church or a market; for here the church or market, though not the property of the right-holder, are in obvious analogy.

possession of an easement or other right; for I may walk down your garden a dozen times on my way to transact business with you in your house, but no one would say I have any possession of a right of way through your garden. On the other hand, you inform me that a path across your field is at my service for ever, and remove a locked gate which hitherto blocked it up. I am in possession of the right of way thus granted, as effectually as if I walked over the land in order to assert my right. So, if without any permission or grant, but still for generations past, I have openly and peaceably and as of right, walked along a certain line, and can do so when I please, though for weeks together I may not need to go that way, still I am in possession. There must *be the physical possibility of enjoying the right, at any time, and the intention so to enjoy it as one's own right,* the owner of the servient property submitting to this. I have also explained[5] the difficulty that arises as regards the continuance of the quasi-possession of these rights when, in their nature, they are 'discontinuous.'

§ 9.

These servitudes or rights are acquired very much in the same way as property is. They may be acquired now by *transfer.* For example, my house A has a right of way to it through a certain courtyard. If I sell the house A, the right naturally goes with it.

Some rights cannot be transferred: this is usually the case with personal rights, and arises from their nature. For example, I have a right to take firewood from the neighbouring forest. Here the origin and nature of the right may indicate that it is a right for the personal convenience of the right-holder. I then cannot sell the right to some one else. Not only is the right itself inalienable, but the right-holder cannot sell the produce he obtains in the exercise of the right, because it is for his own use and convenience, and if he does not personally require it he ought not to collect it. But there may be cases where the right itself is to *cut for sale,* as

[5] Page 15, § 23, *ante.*

where hill tribes have a right to cut firewood or bamboos and carry them for sale to the neighbouring towns[6].

§ 10.

These rights sometimes originate in a *grant* by the proprietor of the estate. Generations ago, the lord of a forest may have granted to my ancestor and his descendants for ever, a right to take ten trees annually from his forest for building purposes.

§ 11.

But more frequently, especially in India, the origin of the right is not so traceable. It is then said to be a 'prescriptive' right, and this term has been explained. No one very much cared about the often vast tracts of waste and jungles in the old days, and so the neighbouring villagers got into the habit of openly and, as of their own right, and peaceably, grazing cattle, cutting bamboos, collecting dead leaves, and so forth, in the forest. This went on from year to year, and from generation to generation, till the practice is held under our law to have "ripened by prescription" into a *right*. The Limitation Act, as I before remarked, admits this in all cases where the right has been exercised "peaceably and openly" by any person claiming title thereto as an easement (*i.e.*, as a right not arising out of mere agreement or contract), and as of right, without interruption for twenty years[7]. Where such a practice had gone on in a forest which Government, say, had distinctly claimed as its own, at settlement or otherwise, and where the people knew they were acting on sufferance and by permission,

[6] Forest Rights are so very generally (in their origin and nature) rights for personal convenience, that the Forest Law in India contains an express provision that no forest rights can, as a rule, be alienated, unless, of course, they are appendant and follow the transfer of the dominant estate, or unless it expressly forms part of the right itself, that its enjoyment is alienable, or the produce of it saleable.

[7] Section II § 23. I have there explained what interruption means, and how far it is necessary that the right should have been used without intermission.

there would be no real right, but only a permissive enjoyment or license[8].

§ 12.

As I have described how separate rights of user or servitude may be acquired and possessed, so I must say a few words as to how they may come to an end.

When rights are extinguished by compensation, pursuant to a special provision of the law, they of course cease to exist. This part of the subject I shall consider further on, with special reference to forest rights.

There are, however, certain general matters connected with the extinction of rights which may be mentioned.

[8] Our Forest Law has not taken notice of anything but actual rights, which is the proper plan, because, in the case of what is technically a mere permission, one of two things would happen: either it would be a matter so clearly of favour that it might be simply stopped without hardship at any moment and would need no special consideration, or else it would be a practice so nearly resembling an actual right that Government would practically allow it to be such, and treat it accordingly.

I may here briefly remark that it was doubtful whether a right of this kind could, under the Roman law, be acquired by prescription, and in a case decided by the Bombay High Court in 1875 (Conservator of Forests *v.* Nagar das Saubhagya das) KEMBALL, J., said.—"It may be a question whether, assuming that there is satisfactory proof of user, the right to cut down and dispose of timber on Crown lands, in other words, to enjoy absolutely that which is incidental to the proprietorship of the soil, can be claimed by prescription."—(See *Attorney Genl.* v. *Mathias*, 27 L. J., Chanc. 761.) The meaning of the passage is this: that the right of cutting trees belongs, of course, to the owner of the soil; and, consequently, persons who go without leave and cut trees of their own accord, are, strictly speaking, trespassers, and are committing a theft; and the principle laid down in the law case alluded to by the learned Judge was that no length of time will give you a right to do an act which is in itself unlawful. The case, however, of taking timber and forest produce is rather peculiar, because, though the land belonged, as all unoccupied waste does, to the Crown, still no one, not even the Crown itself, looked upon the occasional or even constant taking of timber, grass, &c., as any wrong, but rather as an innocent practice, which it could at any moment stop, if it wanted to do so, but which the State did not in fact care to stop. In such a case it would be hard to say that the practice could not ripen by prescription into a right. The question, however, has been wholly set at rest since the passing of the Limitation Act of 1877, which clearly recognises the acquisition of any "easement" (including rights of user of forest produce) by prescription.

As to the distinction between a *right of user*, and a license exercised *on sufferance* and the objection to the term 'privilege' so often used to indicate the latter in India, the student will find some further remarks in the Chapter on Forest Rights, further on.

Some rights are only granted for life; they, of course, become extinct when the right-holder dies. So a right may be granted in consideration of some service; it expires when the service ceases to be rendered.

A right also may be voluntarily given up, as where a right-holder, without objection, permits a total alteration in the management of the servient estate, whereby the exercise of his right is necessarily rendered impossible[9].

If a forest or other estate which bears the right is washed away by river action, the right itself ceases also.

A right also that has not been in existence for the last twenty years, would have been lost by prescription.

If also a right that has been obstructed ("interrupted") and the obstruction has been acquiesced in, or submitted to, for one year after the right-holder had notice of the interruption, the right would be extinguished (unless, of course, a new period of twenty years' enjoyment ran after the interruption).

A right (as I before explained) which has been generally maintained during twenty years, may have been voluntarily intermitted in its exercise from time to time, without being lost; but if it has even been voluntarily intermitted for two years next before bringing a suit to establish it, the intermission will be fatal[10].

Forest rights also are extinguished if in the process of settling a reserved forest, they are neither claimed nor ascertained to exist[1].

[9] Roth, § 315.

Ibid, §315, No. 4. Whether it would revive again, on new land forming in the same place, I cannot here undertake to determine.

[10] Limitation Act, sec. 26 (Act XV of 1877), and see section § 23, *ante*. See also Act V of 1882 (the Easements Act), which includes all *real* servitudes, *i.e.*, rights that are for the beneficial enjoyment of some property. The Act is, however, not yet in force save in Madras and the Central Provinces and Coorg.

[1] Forest Act VII of 1878, section 9; Burma Act XIX of 1881, section 19.

I have only attempted to note, by way of illustration, a few of the cases in which the extinction of rights is likely to occur in the experience of a Forest Officer. In systematic treatises on the subject, this matter is more scientifically treated: thus, for example, Eding (page 125) enumerates the causes of extinction:—

(1) The disappearance of the dominant estate; *i.e.*, a village has a right of grazing; Government expropriates the whole land, and the inhabitants go away and the estate ceases to exist, the right ceases also.